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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WILLIAM J. KENNEY, JR., et al., Plaintiffs and Appellants v. TANFORAN PARK SHOPPING CENTER, Defendant and Appellant.	G038323; G039372 (Super. Ct. No. 04CC05831) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Judgment affirmed as modified.

Dell'Ario & LeBoeuf, Alan Charles Dell'Ario and Jacques LeBoeuf for Plaintiffs and Appellants.

Wheeler & Sheehan, David C. Wheeler and Joseph J. Sheehan for Defendant and Appellant.

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I. INTRODUCTION

Brokers William Kenney and Robert Peltzman entered into an exclusive listing agreement with Tanforan Park Shopping Center. When Tanforan fired Kenney and Peltzman prior to the agreement's expiration, the two brokers sued Tanforan for breach of contract. The trial court found that Tanforan wrongfully terminated Kenney and Peltzman and awarded damages of about $955,000 based on the commissions Kenney and Peltzman theoretically *would have* earned under the contract. (They actually never *earned* any commissions under the contract because they themselves leased *nothing* on behalf of Tanforan.) The court later amended its judgment to award Kenney and Peltzman prejudgment interest under Civil Code section 3287, subdivision (b), and attorney's fees.

Despite winning almost one million dollars for having done no actual work, it is Kenney and Peltzman, not Tanforan the defendant, who primarily appeals from the judgment. Kenney and Peltzman challenge the judgment on four grounds:

-- They claim they are entitled to commissions based on *all* the leases obtained by subsequent brokers. (They *got* commissions on 34 leases; they *claim* commissions on 69 leases.)

-- They claim additional commissions over the ones they got (i.e., beyond the 34) based on the leasing agreement's 360-day tail provision.

-- They claim the court erred in reducing their recoverable damages by applying the doctrine of mitigation.

-- They claim they are entitled to mandatory prejudgment interest.

These arguments fail, but for diverse reasons. The assertion that Kenney and Peltzman are entitled to a commission on *all* 69 leases eventually obtained by Tanforan is contrary to the law that limits a terminated broker to what he or she *would have earned* if the contract had not been terminated. (See Civ. Code, § 3300; *Alderson v. Houston* (1908) 154 Cal. 1, 10 [damages are calculated on what agent "would have earned if allowed to carry out the contract"].)

The argument that they are entitled to commissions beyond the 34 accorded them by the trial judge under the 360-day tail provision fails because they were, in fact, compensated for all prospective lessees as of 360 days from the date -- June 14, 2002 -- that they themselves supplied a list of potential lessees pursuant to the contract's 360-day tail provision. What Kenney and Peltzman really want on appeal is for the 360-day tail provision to encompass every lessee who signed up within 360 days of the date of *termination in the formal contract*, that is, within 360 days of July 31, *2004*. But there is no basis for such extra compensation when one realizes that the contract had long been terminated prior to July 31, 2004. Indeed, in their own letter of May 20, 2002, Kenney and Peltzman stated that they recognized Tanforan's breach of contract and would stop working on the project. (The list of prospects pursuant to the 360-day tail provision came later in the June 14, 2002 letter.)

The question of mitigation, *as presented in the opening brief,* is based on the theory that Kenney and Peltzman could have made income on top of what they were entitled to under the contract because what they would have earned under the contract did not require their full time services. The error here is one of logic: not taking into account the implied excluded middle. Or -- in plainer terms, it's not either-or.

While it is true that Kenney and Peltzman had some free time to earn income beyond what was necessary to obtain leases for Tanforan, consummating the Tanforan leases certainly would have required *some substantial* time. The trial court recognized this fact, and based its reduction for mitigation of damages based on the premise that Kenney and Peltzman would have needed 60 percent of their time to have earned what the trial court prognosticated they "would have" earned. There is no challenge to the 60 percent figure as unsupported by substantial evidence.

We should note here, though, that one, rather subtle, aspect of the mitigation issue has *not* been raised on appeal. Apropos what we have said above about the 360-day tail, it is at least arguable that no mitigation should have been applied to

those leases (if we count correctly, no more than 14 of them[1]) that Kenney and Peltzman got credit for by way of the 360-day tail period of May 2002 through May 2003. The argument would be that *those* particular commissions were, as of May 2002, in the bag and therefore the two brokers would not have needed to spend *any* of their time on them. But that theory is not presented in the opening brief, and we may treat that subtlety as waived.

Likewise, as to prejudgment interest, while it is arguable that the commissions on those 14 leases were capable of being made certain prior to trial, that precise argument is also not the one proffered by the opening brief. The argument in the opening brief is entirely predicated on Kenney and Peltzman winning the whole enchilada on their first point, namely that they were *entitled* to commissions on *all* leases, not just leases that "would have been" earned if the contract had not prematurely terminate. But the quest for the whole enchilada, as we have noted above and will explain in more detail below, is in vain.

For its part, Tanforan has brought its own cross-appeal, contending that the trial court improperly assigned the burden of proving whether the leases that eventually were obtained were "extensions" or "renewals" for purposes of calculating the leases Kenney and Peltzman *probably* would have earned under the contract had the contract remained in force. The point is a non-issue because it turns out that the trial court actually did put the burden on Kenney and Peltzman, which is where it properly belonged in the first place. The cross-appeal also challenges attorney fees awarded to Kenney and Peltzman based on work done in a previously dismissed case over the same matter. Since that work was necessary for the second case, the award was within the trial judge's discretion.

There is, however, this loose end: *Pre*judgment interest was added after judgment was entered and an appeal was taken. On that small point, Tanforan must

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[1] Or maybe 16 at the most, if one counts through July 2003 as distinct from May 2003. Then again, it appears that at least one actual lease that they got credit for, the Blue Heaven Gift Shop, was *not* on the June 14, 2002 list.

The court appreciates the helpful Appendix B attached to the opening brief, which details the 69 or so leases at issue.

prevail. Because the trial court lacked the jurisdiction to make such an award after a notice of appeal was filed, the award is void. However, rather than bother the trial court with this matter, we will simply modify the judgment on appeal to strip from it the prejudgment award, and, as modified, affirm the judgment.

II. FACTS

Tanforan Park Shopping Center, LLC ("property owner") is the owner of a large shopping center. The property owner entered into an exclusive right to lease agreement with brokers William Kenney and Robert Peltzman ("original brokers"). Under this agreement, the original brokers were entitled to a commission on each lease procured during the term of the agreement, except for holdovers, assignments, extensions or renewals of leases with existing tenants. Further, the agreement contained a tail provision entitling the original brokers to a commission for each lease entered into during the 360 days after the expiration or termination of the contract, provided that the original brokers negotiated with the tenant and identified the tenant in writing within 30 days of the expiration date or earlier termination of the listing agreement. This agreement was to expire on July 31, 2004; however, the property owner retained the right to terminate the agreement earlier should either of the original brokers fail to remain directly involved in the leasing of the property.

Shortly after entering into the leasing agreement, the property owner realized that the shopping center needed to be renovated. The original brokers agreed to negotiate the removal of the tenants. In many cases, these negotiations included negotiations for re-leasing the shopping center.

On May 17, 2002 the property owner sent a letter to the original brokers attempting to terminate the leasing agreement on the ground that the brokers failed to remain directly involved in leasing the property. Subsequently, on June 14, 2002, the original brokers provided the property owner with a list of prospective tenants with whom they had negotiated.

Within 10 days (on June 24, 2002) a lawsuit was filed by the original brokers for breach of contract action against the property owner. Ten months later, the

original brokers sought leave to amend their complaint to request a declaration that the leasing agreement was still in effect. The court denied this motion, finding that the original broker's election to sue for breach of contract damages based on the termination of the leasing agreement precluded them from seeking declaratory relief affirming such agreement. The original brokers eventually dismissed the lawsuit.

Several weeks later, the brokers re-filed the case in San Mateo Superior Court, including a cause of action for declaratory relief that the leasing agreement was still in effect. The case was transferred to Orange County. The property owner then moved to strike the declaratory relief action, and the court granted the motion, reiterating its finding that the leasing agreement was terminated upon brokers' filing of the breach of contract lawsuit.

The breach of contract issue proceeded to a bench trial. The trial judge found that the property owner's attempt to terminate the leasing agreement was a breach of the leasing agreement. As to the measure of damages, the court reiterated the finding that the contract had been terminated, and thus rejected the original brokers' attempt to recover the full commissions under the terms of the contract. Instead, the court awarded damages based on the commissions the original brokers would "have earned under the agreement had Tanforan not breached, minus expenses and reasonable mitigation."

The court then determined the commissions the original brokers would have earned during the leasing period by calculating the commissions due on leases that the new brokers signed with prospective tenants that the original brokers had identified on their June 14, 2002 list of prospective tenants. The court awarded the brokers commissions on 34 leases, including a number of leases with pre-existing clients, minus $145,000 based on the original brokers' mitigation of damages. The trial court entered the judgment for about $955,000[2] (if one does the math on the face of the judgment) on January 3, 2007.

[2] The trial court found that the original brokers would have earned $1,190,302 in commission. The trial court then reduced this amount by a total of $145,000 in mitigation and $90,000 based on draws paid to the original brokers against future commissions.

On March 1, 2007 the original brokers filed a notice of appeal. On March 21, 2007 the property owner filed their own notice of appeal.

After the trial court issued its statement of decision, the original brokers moved for an award of prejudgment interest under Civil Code section 3287. On April 3, 2007, after both parties appealed the judgment, the trial court awarded the original brokers discretionary prejudgment interest from May 14, 2004, the date the matter was transferred to Orange County. An amended judgment was entered on May 25, 2007. On June 22, 2007 the trial court awarded the original brokers attorney's fees, and a second amended judgment was entered on July 17, 2007.

On September 27, 2007 the property owner filed a notice of appeal from the second amended judgment.

III. DISCUSSION

A. *The Original Brokers' Appeal*

1. Proper Measure of Damages for Breach of an Exclusive Right Agreement

a. *Measure of Damages for Breach of Contract*

The original brokers treated the property owner's May 17, 2002 letter as an anticipatory breach of the exclusive right to lease agreement between the parties and elected to pursue a breach of contract claim against the property owner. The proper measure of damages in a breach of contract action is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby." (Civ. Code § 3300.) In the context of breached brokerage agreements, the statute requires a "would have earned" standard, as made plain by *Alderson v. Houston* (1908) 154 Cal. 1, 10 (*Alderson*).

In *Alderson*, the California Supreme Court applied Civil Code 3300 to determine the amount of damages recoverable for a breach of contract claim arising out of the breach of an exclusive right to sell agreement. The *Alderson* court held that, where a real estate agent pursues a breach of contract action based on a property owner's repudiation of his obligations under an exclusive right to sell contract, the agent is

entitled to recover as damages the amount he probably "*would have earned if allowed to carry out the contract*." (*Alderson, supra*, 154 Cal. at p. 10, italics added.)

The court ultimately found that the agent was entitled to its full commissions provided in the contract because there was sufficient evidence to support a finding that, absent the breach, the agent likely would have sold all of the properties covered by the agreement, earning the full commissions. (*Alderson, supra*, 154 Cal. at p. 16.)

A number of courts addressing the measure of damages where a broker sought to recover based on the breach of an exclusive right contract have denied recovery of the full commission provided in the contract as breach of contract damages based on the absence of a causal connection between the breach and damages sought. For example, in *Never v. King* (1969) 276 Cal.App.2d 461, 471, the court upheld a judgment denying a broker recovery of a commission based on respondent's breach of an exclusive agency agreement. The *Never* court specifically rejected the broker's argument that, assuming the property owner anticipatorily breached the exclusive listing agreement, "upon principles which have been developed and applied in connection with contracts giving an exclusive agency, or an exclusive right to sell or lease real property, . . . [a broker] is entitled to damages *measured by the commissions set forth in the contract*." (*Never v. King, supra*, 276 Cal.App.2d at pp. 470-471, italics added.) Instead, the court held that in the absence of any evidence to establish that the broker would have earned the commission had the appellant not breached the contract, the trial court properly denied the broker's damages. (*Ibid.*)

Similarly, in *Metzenbaum v. R.O.S. Associates* (1986) 188 Cal.App.3d 202, 211-212, the court addressed the measure of damages appropriate in a breach of contract action arising out of the breach of an exclusive brokerage agreement to procure a loan. The *Metzenbaum* court found that the breach of an exclusive right contract does not automatically entitle a broker to its full commissions under the contract. Instead, relying on Civil Code section 3300, the court found that "[i]n breach of contract actions, damages cannot be *presumed* to flow from liability. 'It is essential to establish a *causal connection*

between the breach and the damages sought.'" (*Ibid*., italics in original.) Based on this requirement, the court held that despite respondent's breach of an exclusive brokerage agreement, the trial court properly held that the broker could not recover his commission as damages because respondent's breach was not the proximate cause of the broker's loss of the commission. (*Id.* at p. 212.)

Allowing the original brokers to recover commissions for all the leases eventually obtained by the new brokers would be in violation of the measure of damages established in Civil Code section 3300. (See *Never v. King*, *supra*, 276 Cal.App.2d 461, 478 ["In the absence of . . . a sale, or some evidence to show that the property could have been sold at a price contemplated by the agency agreement, the promise to pay the commission results in damages which may exceed those contemplated by section 3300 of the Civil Code"].) Therefore, the trial court was correct in limiting the original brokers' recovery of damages based on a breach of contract action to the commissions the brokers would have earned under the exclusive right to lease agreement had the property owner not breached.

b. *The Original Brokers Were Not Entitled to Damages Measured by the Full Commissions Provided in the Contract*

The original brokers contend that, under applicable case law, the proper measure of damages in an action for breach of an exclusive right agreement is the full commissions provided under the terms of the contract. This argument confuses the nature of the action at issue in the present case. In all of the cases cited by the original brokers, the brokers were entitled to their commissions under the express terms of the contract before the brokers brought an action against the property owner. (See *Baumgartner v. Meek* (1954) 126 Cal.App.2d 505; *Wright v. Vernon* (1947) 81 Cal.App.2d 346; *Century 21 Butler Realty, Inc. v. Vasquez* (1995) 41 Cal.App.4th 888.) In fact, in all of these cases except *Wright*, the only breach at issue was the property owner's failure to pay money already owed under the express terms of the contract. In such situation, the proper measure of damages is the full amount of compensation due

under the contract. (Civ. Code, § 3302 ["The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon"].)

Thus, in *Baumgartner v. Meek*, *supra*, 126 Cal.App.2d 505, 506, a property owner entered into an exclusive listing agreement that specifically provided for the payment of a commission to the broker if the property was withdrawn from sale during the listing period without the broker's consent. Prior to the termination of the listing agreement and before the broker could secure a buyer, the owner withdrew the property from sale. (*Id.* at p. 507) The court held that the broker was entitled to recover her full commission as money owed under the withdrawal from sale provision in the contract, not as damages resulting from the property owner's breach of contract. (*Id.* at p. 512 ["The distinction between an action for breach of the promise by the owner not to revoke or deal through others or sell himself during the stipulated term . . . and a contractual provision whereby . . . the owner directly promises that if he sells through others or by himself or revokes he will pay a sum certain, is . . . clear . . . . The [latter] action is for money owed, an action in debt . . . and the only breach involved is the failure to pay the promised sum."]; see also *Maze v. Gordon* (1892) 96 Cal. 61, 66-67 ["By the terms of the employment, commissions became due 'in the event of withdrawing the sale of said property during the time.' The claim to compensation under this provision of the contract is not, as respondent suggests, as damages for a breach of the contract in withdrawing the land from sale. This [the property owner] had a right to do, and in such event, he became indebted to plaintiff for his commissions."].)

Similarly, in *Wright v. Vernon*, *supra*, 81 Cal.App.2d 346, 347, while an exclusive right to sell agreement was in effect between the parties, the property owner breached the contract by hiring a new broker and, two days later, trading the property through the new broker. At the time the property was traded, the broker had not brought a breach of contract action, and the exclusive right to sell agreement was still in effect between the parties. The court found that, under the exclusive right to sell contract, the property owner had an obligation to pay the broker a commission where the property

owner disposed of the property through another broker during the listing period. (*Ibid.* ["The authorities in this state follow the rule that an agency contract carries the implication that the owner reserves the right to sell without obligation to pay the stipulated commission to the broker. . . . The rule is *contra* when the contract gives the agent the exclusive 'right to sell' and where the owner sells through another agent."].) Thus, under the terms of the contract, the broker was entitled to recover the commission as provided in the contract.

In *Century 21 Butler Realty, Inc. v. Vasquez, supra*, 41 Cal.App.4th at page 892, the court clarified that an action seeking recovery of earned commissions is based on an express promise to pay contained in the contract in force between the parties at the time the commissions were earned. The exclusive listing contract in *Vasquez* provided that the broker would receive a commission if, "'irrespective of agency relationship, . . . the property is . . . sold . . . during the term hereof . . . by Broker, or through any other person.'" (*Ibid.*) After the owners rightfully terminated their agency relationship with the broker, another broker sold the owners' property. (*Ibid.*) Because there was no breach of contract associated with the termination, the listing agreement was still in effect. (*Ibid.*) The court held that the first broker was entitled to recover the full commission provided under the exclusive listing agreement even though the agency relationship between the parties had been terminated because, under the terms of the contract in effect between the parties, the broker was entitled to a commission based on any sale of the property during the listing period. (*Ibid.*)

Here, by contrast, prior to the original brokers' breach of contract claim, the property owner did not owe the original brokers any commissions under the express terms of the exclusive right to lease contract.[3] At the time that the original brokers filed their breach of contract action, *no leases* had been entered into by the property owner, either through the original brokers or the subsequent brokers. Thus, the property owner

[3] Whether a broker is entitled to earned commissions under an exclusive right to sell contract depends on the express terms of the contract. (*Century 21 Butler Realty, Inc. v. Vasquez, supra*, 41 Cal.App.4th at p. 891 ["Whether the broker may recover compensation depends on the terms of the particular listing contract"].)

Here, the exclusive listing agreement provided only for the payment of a commission for leases entered during the term the contract was in effect or during the 360 day tail period, provided that certain conditions were met.

had no obligation to pay the original brokers any commissions *at the time* the breach of contract action was brought.

The original brokers contend that, despite the termination of the leasing agreement, they were entitled to recover the full commissions as measured under the provisions of the contract. However, when a broker pursues a breach of contract claim against a property owner, each party's rights and obligations under the contract "are to be regarded as then culminating." (*Alderson, supra*, 154 Cal. at p. 12.) Thus, once the original brokers brought suit against the property owner based on the wrongful termination of the exclusive right agreement, the provisions of the contract were no longer binding on the parties, and thus, unless the broker was expressly entitled to commissions before the breach, the broker may not later seek to recover commissions earned under such provisions.

The original brokers' reliance on *Century 21 Butler Realty, Inc. v. Vasquez*, *supra*, 41 Cal.App.4th 888 for the proposition that despite the termination of the relationship between the parties, the original brokers were still entitled to earned commissions for the remainder of the leasing period is misplaced. In *Vasquez* the property owners had the right to terminate the listing agreement, and thus, upon such termination, the agent never brought a breach of contract action terminating the entire contract. Further, the contract at issue expressly provided that, regardless of the agency relationship, the agent was entitled to a commission based on any sale during term of the listing agreement. Because the property was sold *before the termination* of the listing agreement, the agent was entitled to the earned commission. The property owner failed to pay the agent's earned commission, and the agent brought a cause of action based on the breach of an obligation *to pay money only*.

The recent case of *Schaffter v. Creative Capital Leasing Group* (Aug. 11, 2008, D047364) 166 Cal.App.4th 745, is also inapposite. In *Schaffter*, the brokers actually earned commissions under a contract to find various buyers for condominiums, but their *principal* (the defendant) defaulted on *its* agreement to go through with the deals. So, of course, the trial court awarded damages under the contract. On appeal, the

principal did not contest the amount of the damages, but made an unsuccessful argument that the contract itself was "void" because of an indefinite termination date. (See *id*. at p. 753.)

In the present case, at no time were the original brokers entitled to recovery based on the breach of an obligation to pay money under the express terms of the contract. Instead, the original brokers' action arises solely out of the wrongful termination of an exclusive right to lease agreement. The cases relied on by the original brokers to support their contention that the proper measure of damages based on the breach of an exclusive right agreement all involve the breach of an obligation to pay money owed under the express terms of the contract. These cases are inapplicable here because the proper measure of damages in an action to recover based on the breach of an obligation to pay money only is different than the measure applied in other breach of contract actions. (Compare Civ. Code, § 3300 [damages for breach of contract] with Civ. Code, § 3302 [damages for breach of obligation to pay money only]) Therefore, the trial court judge was correct in denying the original brokers the full commissions provided for under the contract.

The original brokers further argue that under Civil Code section 1086, the brokers are entitled to the full commissions provided for in the contract. However, it is well established that "[a]ny right to compensation asserted by a real estate broker must arise from the four corners of the employment contract." (*Howard Gitlen & Associates, Inc. v. Ameri* (1989) 208 Cal.App.3d 90, 95, citing *Blank v. Borden*, *supra*, 11 Cal.3d 963, 969.)

By its own terms section 1086 requires a sale or lease during the period of time during which the broker has been granted the exclusive right to sell the property in order for the broker to be paid the commissions under the listing agreement. (Civ. Code, § 1086, subd. (f)(1) ["An 'exclusive right to sell listing' is a listing whereby the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find or obtain a buyer for the property, and the agent is entitled to the agreed compensation if during that period of time the property is sold"].) The section presupposes that a contract

is in effect between the parties. (*Ibid.* ["A 'listing' is a written contract between an owner of property and an agent by which the agent has been authorized to sell the property or to find or obtain a buyer. . . . A listing may be any of the following: (1) [a]n 'exclusive right to sell listing'"].) Where, as here, the contract has been terminated, the broker is not entitled to recover commissions under section 1086.

2. Entitlement To Commissions On Leases Under The Contract's Tail Provision

As to the 360-day tail provision,[4] it is important to recognize what is, and what is not, raised in their appeal. The original brokers present no argument that the trial court *didn't* include, within the 34 leases that formed the basis of the judgment in their favor, any leasing prospects that were *on the list furnished on June 14, 2002* and which resulted in leases within 360 days of June 14, 2002. (Certainly their brief makes no effort to identify any such overlooked prospects.)

Rather, the argument on appeal is focused on precisely when the 360-day tail provision should begin to run. In their brief, they assert that the 360-day tail provision entitles them to all leases signed within 360 days of the "end of the term" of the contract, i.e., within 360 days of July 31, 2004. In other words, their 360-day tail argument is simply another approach to getting credit for *all* the leases eventually signed. (In their briefing, they specifically allude to *three* leases signed after *July 24, 2004*, including a fairly lucrative one with Century Theaters, on which they contend they received no credit.[5])

In this regard, their theory is a variation on the one we have just dealt with, and rejected, namely, that the contract never really terminated until July 31, 2004 (hence, without doing the precise counting of 360 day tail provision, would extend to about July

[4] Under this provision, the property owner agreed to pay the original brokers a commission for each lease "entered into . . . within three hundred sixty (360) days after the expiration or earlier termination of this Agreement with any prospective user . . . with whom Agents had negotiated" provided that the original brokers disclosed the name of the prospective tenant to the property owner within 30 days after the expiration or earlier termination of the contract.

[5] Maybe. Without getting into the math, it is hard to figure how the trial court reached the $1.19 million base damage figure on which the judgment is predicated without at least the theater contract, but since the issue is strictly a legal one, i.e., whether there is an entitlement to credit for leases signed after July 2004, we can leave the calculuation issue alone.

25, 2005). The idea fails because the contract's tail provision required affirmative action on the part of the original brokers -- furnishing a list -- and the only list that they actually furnished was furnished in 2002, and that in connection with their own recognition in the May 20, 2002 letter (we note that the list of June 14, 2002 was within 30 days of that date) that the contract had been terminated. After all, in that letter they asserted that they would discontinue work for the property owner. So there is no basis on which to predicate a 360-day tail beginning on a date more than two years later.

3. Duty To Mitigate

Again, with mitigation, it is important to recognize what is, and is not, argued in the opening brief. The original brokers present no challenge to the sufficiency of the evidence in the *application* of the doctrine of mitigation. (The trial court reduced their award by $105,000 for Peltzman and $130,000 for Kenney; we will not attempt to explain precisely how, except to say that the court noted the two brokers were spending only 60 percent of their time on the Tanforan contract prior to the breach.)

Rather, the only issue is whether mitigation should have been applied *at all*. More specifically, the original brokers assert that because the contract did not require all or most of their time, or forbid them from undertaking contemporaneous employment, their other earnings could not be subtracted under the doctrine of mitigation.

Mitigation, of course, applies just as much to exclusive broker contracts as to other contracts. As the court said in *Alderson v. Houston*, *supra*, 154 Cal.4th at pp. 10-11: "Such damages are the whole amount of unearned compensation which he would have earned if allowed to carry out the contract; *but the principal may reduce such amount of damage by showing affirmatively . . . that the agent will probably find similar employment*." (Italics in original deleted, italics added.)

The cases cited by the original brokers are inapposite. In *Payne v. Pathe Studios, Inc.* (1935) 6 Cal.App.2d 136, 142, the court stated that "the rule as to mitigation of damages in cases of contracts of hire does not apply to contracts not requiring all or the greater portion of the time of the party employed, or which do not preclude the party from undertaking and being engaged in the performance contemporaneously of other

contracts." However, the *Payne* court did not provide any guidance in applying this exception to the rule of mitigation of damages because the court held that, in an action to recover compensation due under a contract, as was the issue in *Payne*, the doctrine of mitigation does not apply. (*Ibid.*) In *Gollaher v. Midwood Const. Co.* (1961) 194 Cal.App.2d 640, 651 footnote 4, the court applied the exception to the doctrine of mitigation mentioned in *Payne*. The *Gollaher* court noted that, under the rule of mitigation, where one party breaches a personal services contract, the non-breaching party must " 'seek other employment, and thus diminish the damages sustained by him.'" (*Ibid*.) The court went on to hold that the rule did not apply in the instant case because the "agreement was not to render personal services, but only to accomplish a *specific result*. The plaintiffs were at liberty to leave this work entirely to the care of the hired servants." (*Id.* at pp. 651-652, italics added.)

Here, by contrast, the exclusive right to lease contract in the present action required the original brokers to perform *personal* services. The property owner had the right to terminate the agreement if either of the original brokers was no longer directly involved in the leasing of the shopping center or if the original brokers failed to perform their duties and fulfill their responsibilities. While the contract did not expressly preclude the original brokers from contemporaneously undertaking and performing other contracts, their ability to do so was severely limited because they were precluded from delegating their obligations under the leasing agreement and devoting such time to fulfilling other contracts.[6]

We should note, however, that a more subtle and perhaps arguably meritorious point concerning mitigation has not been raised. That is, as to those particular prospects on the June 14, 2002 list that were signed within 360 days of that date (or arguably within 360 days of the May 20, 2002 letter), one could assert that they were "in the bag" and thus the original brokers were entitled to credit for them *regardless*

[6] As indicated above, the trial court specifically found that, before the breach, the original brokers were spending, on average, 60 percent of their time to fulfill their duties on the Tanforan job.

of whatever time they might have had to spend to eventually consummate the leases. But that point has not been raised, so we may deem it waived.

4. Prejudgment Interest Under 3287, Subdivision (a)

Last, the original brokers contend that if they were entitled to recover the full commissions as provided in the contract, the court was required by law to award prejudgment interest under Civil Code section 3287, subdivision (a).

Civil Code section 3287, subdivision (a), provides that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day." The original brokers concede that "the trial court's measure of damages -- the amount that it estimated that [the original brokers] would have earned had they remained on the job -- didn't yield a sum certain." Because the trial court did not err in the finding that the original brokers were not entitled to the commissions as provided in the leasing agreement, either as damages for the breach or under the tail provision, the original brokers are not entitled to Civil Code section 3287, subdivision (a), prejudgment interest as a matter of law.

B. *The Property Owners' Cross-Appeal and Second Appeal*

1. The Trial Judge Properly Allocated the Burden of Proof

In its cross-appeal, the property owner contends that the trial court erroneously allocated the burden of proof as to whether the leases entered into with existing tenants were extensions or renewals of old leases.

Damages are, of course, an element of an action for damages based on the breach of a contract (e.g., *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1391 fn. 6), hence the plaintiff has the burden of proof on the issue, including both the fact and the amount of damages (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239). To meet this burden in the context of

an action based on breach of an exclusive right contract, a broker must establish with reasonable certainty that he or she would have earned the commissions had the contract not been breached. (See *Never v. King*, *supra*, 276 Cal.App.2d at p. 471 ["In the absence of any evidence to show that plaintiff could have earned his commission but for defendants' repudiation, the court properly directed a verdict for the defendants . . . ."].) And, in fact, we have seen above that the trial court properly applied the "would have earned" standard.

This leasing agreement provided that the original brokers would be paid a commission for each lease entered into by the property owner during the leasing period that was not a renewal or extension. Thus, in order for the original brokers to establish with reasonable certainty that they would have earned the commissions under the contract, they were required to show that *they* would have obtained the leases, as distinct from the leases merely being a renewal or extension. Which is all by way of saying that the original brokers had the burden of proof as to whether the leases with old clients were not extensions or renewals in order to recover commissions for such leases.

In its statement of decision, the trial court found that because the property owner removed the tenants during renovation, the "interruptions in the leases due to renovation would change a lease extension or renewal into a new lease requiring commissions to be paid." The implied finding is that the original brokers sufficiently met their burden on the extensions or renewals issue.

The trial court went on to state that the property owner could have proved that certain leases were in fact extensions or renewals by, for example, conducting a lease-by-lease analysis of the returning tenants to determine if the "new lease for the old tenant was substantially the same as the original lease." However, absent such a showing by the property owner, the trial court found that the old tenants' new leases were not extensions or renewals.

The property owner misconstrues the trial court's statement as placing the burden of proof on it when, in fact, the trial court already found sufficient proof that the

leases were not extensions or renewals. Therefore, the trial court did not improperly allocate the burden of proof as to the extension or renewal of leases issue.

2. The Portion of the Judgment Awarding Prejudgment Interest is Vacated

After the judgment was entered and the parties filed their initial notices of appeal, the trial court entered an amended judgment awarding the original brokers prejudgment interest. The trial court then entered a second amended judgment, which incorporated the prejudgment interest award from the amended judgment.

The property owner's appeal from the second amended judgment challenges the trial court's award of prejudgment interest. The property owner contends that, once the trial court entered the original judgment and the parties filed their notices of appeal, the trial court lacked jurisdiction to amend the judgment, thus rendering the amended judgment void. Further, the property owner asserts that, to the extent that the second amended judgment incorporates the void prejudgment interest award from the amended judgment, it is also void and must be vacated.

a. *The Trial Court Lacked Jurisdiction to Amend the Judgment to Include Prejudgment Interest*

Code of Civil Procedure section 916, subdivision (a), provides that, with limited exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters *embraced* therein or *affected* thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (Italics added.)

Section 916, subdivision (a) thus deprives the trial court of jurisdiction over matters "affected" by or "embraced" in the appeal; hence it "necessarily renders any subsequent trial court proceedings on matters 'embraced' in or 'affected' by the appeal void." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 198.) As our high court said in *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660, "'Lack of jurisdiction in its most fundamental or strict sense means an entire

absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' . . . When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.'"].)

Here, the trial court's amended judgment sought to modify the *appealed* judgment by increasing the amount of damages through an award of discretionary prejudgment interest. But the judgment already on appeal might have resulted in a ruling that the original brokers were entitled to the commissions as provided in the leasing agreement and thus entitled to mandatory prejudgment interest. (See Civ. Code, § 3287, subd. (a).) And an entitlement to mandatory prejudgment interest is irreconcilable with discretionary prejudgment interest provided in Civil Code section 3287, subdivision (b). That is, what the trial court did directly affected what had already been appealed.

Therefore, because the issue of discretionary prejudgment interest is embraced in or affected by the appeal, the trial court's amended judgment, to the extent that it addresses this issue, is void for lack of jurisdiction.

We hasten to add, though, the remainder of the amended judgment, however, is not void. (*Harwell v. Harwell* (1938) 26 Cal.App.2d 143, 145 ["'"If the void portion of the judgment does not infect the whole with invalidity and may be separated from the remainder and treated as surplusage, the judgment will not be avoided *in toto*, but will be upheld as to that portion which was within the jurisdiction and power of the court to render."'"].)

b. *The Second Amended Judgment is Also Void*

A judgment giving effect to a void judgment is also void. (See *County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 110 ["an order giving effect to a void judgment is also void and is subject to attack"][7]; *Security Pac. Nat. Bank v. Lyon* (1980) 105 Cal.App.3d Supp. 8, 13 ["affirmance of a void judgment or order is itself void"].)

The second amended judgment incorporates the trial court's ruling on discretionary prejudgment interest and sought to give effect to this portion of the

[7] *Tillett* was disapproved on another ground in *County of Los Angeles v. Soto* (1984) 35 Cal.3d 483, 492 footnote 4.

amended judgment. Therefore, to the extent that the second amended judgment incorporates a void judgment, the second amended judgment is also void and must be vacated. The remainder of the second amended judgment, however, is not void. (*Harwell v. Harwell*, *supra*, 26 Cal.App.2d 143, 145.)

c. *The Challenge to the Second Amended Judgment*

The original brokers' attack the timeliness of the property owner's appeal from the second amended judgment, arguing that it was filed outside the time to appeal established by California Rules of Court, rule 8.104.

Under California Rules of Court, rule 8.104, a party must file its notice of appeal within 60 days of the mailing or service of the notice of entry or 180 days after the entry of judgment.[8] If the notice of appeal is filed late, the appeal must be dismissed. (Cal. Rules of Court, rule 8.104.) However, this rule does not apply where the judgment being challenged is void. Instead, a judgment void on its face, either because the court lacked personal or subject matter jurisdiction, may be attacked at any time. (*Rochin v. Pat Johnson Manufacturing Co*. (1998) 67 Cal.App.4th 1228, 1239 ["A judgment void on its face because rendered when the court lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant, is subject to collateral attack at any time. . . . An attack on a void judgment may also be direct, since a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, for such a judgment is a nullity and may be ignored."]; *People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th 653, 660

[8] California Rules of Court, rule 8.104 provides in pertinent part:
"(a) Normal time
"Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of:
"(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed;
"(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
"(3) 180 days after entry of judgment.
"(b) No extension of time; late notice of appeal
"Except as provided in rule 8.66, no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal."

["'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.'"].)

Because the filing of the notices of appeal stayed the trial court's jurisdiction to hear the original brokers' motion for discretionary prejudgment interest, rendering the trial court's subsequent judgments awarding such interest void, the property owner was entitled to attack the judgments at any time.

3. The Trial Judge Did Not Err by Awarding Attorney's Fees Incurred in the First Case

The property owner also challenges the trial court's award of attorney's fees, asserting that it improperly includes fees incurred in the first, dismissed action.

a. *Timeliness of Appeal*

The original brokers contend that this court lacks jurisdiction to review the trial court's award of attorney's fees because the judgment, from which the property owner timely cross-appealed, did not determine the issue of attorney's fees and the property owner did not file a timely notice of appeal from the actual fee award.[9]

"[W]hen a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998.) Therefore, if a judgment determines that a party is entitled to attorney's fees, even though the amount is left to be determined at the time the judgment is entered, a timely appeal from the judgment includes a timely appeal of the amount of attorney's fees set by a later order.

Here, the trial court's judgment provided that the original brokers "are deemed to be the prevailing party under the terms of the parties' contract and the California Code of Civil Procedure. [The original brokers] shall file any motion for attorney fees in accordance with California Code of Civil Procedure § 1033.5(c)(5)."

[9] The trial court issued its minute order awarding the original brokers attorney's fees on June 22, 2007, and this order was incorporated into the second amended judgment issued on July 17, 2007. On September 27, 2007 the property owner filed a notice of appeal from the fee award.

Based on the parties' contract[10] and Civil Code section 1717,[11] this finding entitled the original brokers to an award of attorney's fees. The only issue remaining as to the award of attorney's fees at the time the property owner cross-appealed was the determination of the amount of fees to award.[12] Therefore, when the trial court subsequently issued an order addressing this issue, which was incorporated into the second amended judgment, the property owner's timely cross-appeal of the judgment subsumed this order.

The original brokers cite *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1055, for the proposition that "an order determining the entitlement to attorney's fees, but not the amount of the fee award, is interlocutory" and nonappealable. However, *Burke* is distinguishable in that in *Burke* there was no post-judgment order determining the amount of fees. Therefore, unlike in the present case where the amount of fees was determined by the trial court after the cross-appeal was filed, "the trial court could still have ruled that the amount of fees to which the [prevailing party] was entitled was zero." (*Id.* at p. 1054.) Because the amount of fees was left to be determined, additional judicial action was required to determine the rights of the parties. Further, the *Burke* court acknowledged that "*Grant* noted that an appellant seeking review of an attorney's fee award has the *option* of appealing either from the judgment or from the postjudgment order." (*Id.* at p. 1055, italics in original.)

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[10] "If either party shall bring an action arising out of an alleged breach of this Agreement by the other party hereto, the prevailing party in such action shall be entitled to recover from the losing party all of its costs in connection with such action, including without limitation attorney fees."

[11] Subdivision (a) of the statute provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

". . . .

"Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit."

[12] "Attorney's fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties.

"Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a)." (Code Civ. Proc., § 1033.5, subd. (c)(5).)

b. *Recoverability of Attorney's Fees Incurred in the First Case*

Under the express terms of the contract and Civil Code section 1717, the prevailing party is entitled to recover its attorney's fees in connection with the original brokers' breach of contract action. However, the property owner contends that, under Civil Code section 1717, subdivision (b)(2), the trial court erred by including fees incurred in the first lawsuit, which was voluntarily dismissed by the original brokers, in the original brokers' award of attorney's fees.

Civil Code section 1717, subdivision (b)(2), provides that "[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." This subsection precludes a party from recovering attorney's fees in an action that has been dismissed. For example, after the original brokers dismissed their first lawsuit, they were precluded from seeking recovery of attorney's fees in that action.

However, the original brokers' did not seek recovery in the dismissed action, as precluded by section 1717, subdivision (b)(2). Instead they sought such recovery in the second action, in which they prevailed and were properly entitled to attorney's fees under section 1717, subdivision (a). Where a party voluntarily dismisses an action, section 1717, subdivision (b)(2), does not preclude the party from recovering attorney's fees as the prevailing party in a subsequent action, even where the fees were incurred in a prior, dismissed action. (See *Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 656.)

The court addressed a similar issue in *Stokus v. Marsh*, *supra*, 217 Cal.App.3d at page 656. In *Stokus*, the plaintiff voluntarily dismissed an action against the defendant and then re-filed the complaint in a second action against the same defendant. In the second action, the court allowed the prevailing party to recover attorney's fees incurred in the prior, dismissed action under section 1717 because "[d]iscovery conducted in the dismissed case was fully utilized in the refiled action. Precluding fees for this work would . . . foreclose compensation for necessary legal

services . . . ." (*Ibid.*). In fact, "it would be ridiculous to require the attorney to repeat formally all of this work . . . in order to protect his client's rights . . . ." The court specifically found that nothing in section 1717 precluded such recovery. (*Id*. at p. 655.)

Similarly, the discovery conducted by the original brokers in the first, dismissed action was fully utilized in, and necessary to, the second, re-filed action. Because the first lawsuit was not dismissed until the shortly before trial, when both parties had already completed discovery, the court precluded the parties from completing further discovery in the re-filed action. Instead, the parties stipulated that all discovery in the first lawsuit was "deemed to have been taken in [the second] action." As in *Stokus*, it would be ridiculous to require the original brokers to repeat the discovery conducted in the dismissed action solely to protect their right to recover attorney's fees. Based on this, trial court found that "[t]here was no need to have the parties redo the discovery already done and the parties should be able to recover their fees . . . even if done in a predecessor case . . ."

Therefore, because section 1717 does not preclude the recovery of attorney's fees incurred in a prior, dismissed action, the trial court did not err in awarding the original brokers attorney's fees incurred in the first action. Instead, the trial court properly awarded attorney's fees for legal services incurred in the prior, dismissed action where such fees were necessary to the second action.

IV. DISPOSITION

The judgment is affirmed except for the portion of the judgment awarding Kenney and Peltzman prejudgment interest. That portion is hereby vacated. The judgment is affirmed as modified. Tanforan shall recover its costs.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.